

Gilhooly



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Environmental Instruments, Inc.

File: B-231692

Date: July 14, 1988

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### DIGEST

Protest against award to a firm listed in solicitation as an approved source is, in effect, a protest of alleged solicitation improprieties which must be filed prior to the closing date for receipt of proposals and will not be considered by General Accounting Office when it was initially filed with the contracting agency after the closing date.

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### DECISION

Environmental Instruments, Inc. (EII), protests the proposed award of a contract to J-TEC Associates, Inc. (J-TEC), under request for proposals (RFP) No. DAAA09-88-R-0317, issued by the U.S. Army Materiel Command for crosswind sensors for the M1 tank. EII contends that the RFP's provision for production of the sensors without a first article test favors its competitor, and objects to the RFP's listing of J-TEC's part number as an approved item, alleging that J-TEC's product does not meet the RFP's specifications. We dismiss the protest as untimely.

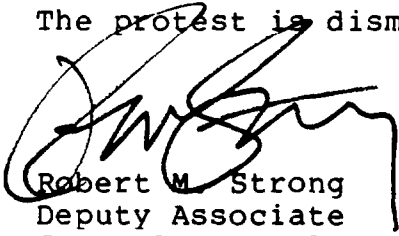
The RFP was issued on April 12, 1988, with a May 12 closing date for receipt of initial proposals. On April 20, the RFP was amended to indicate that the part numbers and national stock numbers (NSNs) for both EII and J-TEC would meet the government's requirements. The closing date was not extended. The amendment was consistent with the amended synopsis of the procurement published in the February 29th Commerce Business Daily, which indicated that the "sole source contractor is Environmental Instruments, Inc. . . . or J-Tec Associates, Inc. . . ." On May 2, EII met with the buyer at the procuring activity to complain that the RFP's provision for production of the sensors without a first article test favored J-TEC. EII sent its proposal by registered mail on May 10. Since the proposal was not received until May 13, the Army notified EII by letter dated May 16 that its late offer would not be considered. By

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letter dated May 26, EII acknowledged that it had submitted a late proposal, but protested that the CBD synopsis and RFP did not comply with the Federal Acquisition Regulation. The Army denied the protest on June 1, and EII protested to our Office on June 10.

The Army asserts that EII's protest is untimely. We agree. Our Bid Protest Regulations provide that a protest based upon alleged solicitation improprieties which are apparent prior to the closing date for receipt of initial proposals be filed prior to closing. 4 C.F.R. § 21.2(a)(1) (1988). Similarly, protests based upon alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. Id. Here, the RFP did not provide for first article testing, and the RFP amendment clearly indicated J-TEC's part number as an approved item of supply. Accordingly, EII's protest was required to be filed prior to the May 12 closing date, and was untimely filed with the agency by letter dated May 26. Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 CPD ¶ 357. Thus, EII's subsequent protest to our Office is also untimely. 4 C.F.R. § 21.2(a)(3); Teledyne CME, B-223609, Sept. 23, 1986, 86-2 CPD ¶ 338. Consequently, we will not consider the protest, notwithstanding the fact that the agency may have considered it, because our timeliness requirements provide objective criteria which may not be waived by action taken by an agency. Astrophysics Research Corp., B-224378, July 25, 1986, 86-2 CPD ¶ 116. We point out that the Federal Acquisition Regulation does not provide for oral protests, so that EII's pre-closing conversation with the buyer is not relevant to the protest's timeliness. Creighton & Creighton, Inc., B-227511, July 2, 1987, 87-2 CPD ¶ 11.

The protest is dismissed.

  
Robert M. Strong  
Deputy Associate  
General Counsel